Supreme Court, U.S.
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No. 97-367

In The

Supreme Court of the United States

October Term, 1997

EUGENE LUMPKIN, JR.,

Petitioner,

v.

WILLIE L. BROWN, Mayor, and the City and County of San Francisco,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment prevents a Mayor from removing a member of the Human Rights Commission for making public remarks that conflict with the Commission's purpose and are interpreted to condone violence against gay men and lesbians, where the Commissioner's remarks relate to his religious beliefs.

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Mayor Willie L. Brown and the City and County of San Francisco ("the City"), respectfully request that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 109 F.3d at 1498.

STATEMENT OF FACTS

Under San Francisco's Charter, the mayor appoints the members of the City's Human Rights Commission. S.F. Charter §3.100; S.F. Admin. Code §12A.4; CR 22, ¶5, CR 23.[1] Members of the Human Rights Commission are high-level City officers. Like other City commissions, the Human Rights Commission ("Commission") overseas a department within the executive branch of City government. The Charter gives the members of the Commission broad and final authority to set policy for the department. S.F. Charter §3.500.

In August 1992, San Francisco's then-Mayor, Frank Jordan, appointed Lumpkin to the Commission. Jordan did so knowing that Lumpkin held the position of pastor of Ebenezer Baptist Church in San Francisco. CR 29, ¶4. Indeed, at the time of his appointment, Jordan had known Lumpkin for 15 to 20 years. CR 29, ¶3.

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[1] The San Francisco voters approved a new Charter in 1996. All references to the San Francisco Charter are to the Charter that was in effect during the events that gave rise to this case.

Upon his appointment, Lumpkin assumed official duties, including the duty to promote equal rights for all without regard to sexual orientation. CR 23, S.F. Admin. Code §12A.2. The City's law set forth the purposes of the Commission as follows:

> [T]o eliminate prejudice and discrimination because of race, religion, color, ancestry, age, sex, *sexual orientation*, disability, or place of birth, to inform the inhabitants of the City and County of developments in human relations . . . and to officially encourage private persons and groups to promote and provide equal opportunity for and good will toward all people.

CR 23, Supp. Excs., Exh. B, S.F. Admin. Code §12A.2 (emphasis added). By law, the Commission hears and decides complaints of discrimination, including those of sexual orientation and AIDS-related discrimination. CR 23, Supp. Excs., Exh. D, S.F. Police Code, §3307.[2]

On June 26, 1993, the San Francisco *Chronicle* quoted Lumpkin as saying: "It's sad that people have AIDS and what have you, but it says right there in the scripture that the homosexual lifestyle is an abomination against God. So I have to preach that homosexuality is a sin." CR 29,

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[2] The Commission exercises its authority under a variety of San Francisco ordinances, including Articles 33 and 38 of the San Francisco Police Code. These Articles prohibit discrimination based on sexual orientation and AIDS, among other things, in employment, housing and public accommodations. CR 23, Supp. Excs., Exh. D. Chapter 12 of the Admin. Code bans discrimination by the City and its contractors based on, among other things, sexual orientation. CR 23, Supp. Ecs., Exh. B.

¶5 & Exh. B. These remarks provoked controversy about Lumpkin's membership on the Commission, particularly in view of the Commission's role in promoting tolerance toward all persons regardless of their sexual orientation. Citizens and other Commissioners called for his resignation or removal. CR 11, ¶¶3, 4; CR 18, ¶¶2, 4; CR 23, Supp. Excs., Exh. C. As Lumpkin himself admitted, "Mayor Jordan was besieged with demands that he fire me from the Human Rights Commission." CR 23, Exh. A at 1.

On July 13, 1993, after meeting with Lumpkin and other citizens, the Mayor announced he would not remove Lumpkin, CR 29, ¶¶5, 6 & Exh. C. The City's legislative body, the Board of Supervisors, reacted by adopting a resolution calling for Lumpkin's resignation or removal. This resolution was adopted by an eight-to-one vote. CR 23, Supp. Excs., Exh. C. The resolution urged Mayor Jordan to "restore public confidence in the role and mission of the Commission, especially with regards to the ability of the Commission to consider complaints and lead the community toward equality and respect for all lesbian and gay San Franciscans." *Id.*

On August 20, 1993, Lumpkin gave a television interview. CR 29, ¶7 & Exhs. D, E. The interviewer identified Lumpkin as a member of the Commission, and reviewed the controversy about his tenure on the Commission. The interviewer then asked Lumpkin, "Do you believe homosexuality is an abomination?" CR 29, ¶7 & Exh. E at 4-5. Lumpkin replied, "Sure, I believe. I believe everything the Bible sayeth." The following exchange ensued:

ROSS McGOWAN: Leviticus also says that a man who sleeps with a man should be put to death. Do you believe that?

MR. LUMPKIN: That's what it sayeth.

ROSS McGOWAN: Do you believe that?

MR. LUMPKIN: That's what God sayeth.

ROSS McGOWAN: Do you believe that?

MR. LUMPKIN: That's – I said that's what the Book sayeth.

ROSS McGOWAN: Do you believe that?

After some silence, Lumpkin stated that God delivered this pronouncement to the nation of Israel after it came out of bondage in Egypt. *Id.*[3]

Later that day, after learning of the interview, Mayor Jordan asked Lumpkin to resign from the Commission. CR 29, ¶8 & Exh. F. The Mayor's news release explained his action: "While religious beliefs are constitutionally protected and cannot be the grounds to remove anyone from elected or appointed public office, the direct or indirect advocacy of violence is not, cannot and will not be condoned by this administration." CR 29, Exh. F.

On Monday, August 23, 1993, the Mayor met with Lumpkin. CR 29, ¶9. When Lumpkin refused to resign, the Mayor removed him from the Commission. *Id.* at ¶¶9, 10 & Exh. G. In a news release, the Mayor stated that his

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[3] Thus, Lumpkin had four opportunities to clarify his beliefs during this interview and to state clearly that he does not endorse the use of violence against gay men or lesbians.

appointees to the Commission must "publicly and privately uphold the principles of justice and equality for everyone" and "vigorously support the enforcement of hate crime statutes." CR 29, ¶10 & Exh. H. The Mayor explained that Lumpkin's remarks "implied that he condoned physical harm." *Id.* The Mayor concluded that "no person will be allowed to serve in my administration whose actions may be interpreted by some to encourage violence or give support to others who seek to justify their hatred." *Id.*

REASONS FOR DENYING THE WRIT

Petitioner Lumpkin contends that the Court should grant certiorari to decide whether the balancing test set forth in *Pickering v. Board of Education of Township High School District 205,* 391 U.S. 563, 568 (1968) applies to religious speech. Alternatively, Lumpkin contends that the Court should grant certiorari to decide whether the courts below properly applied the *Pickering* test.

Certiorari is not needed. Every circuit that has considered the first issue has come to the same, obvious conclusion: The test for determining whether the government may discipline or terminate an employee based upon his speech is the same whether the speech is religious or nonreligious. *See Baz v. Walters,* 782 F.2d 701, 708 (7th Cir. 1986) (applying *Pickering* test to uphold discharge of V.A. Hospital chaplain who used position to proselytize in a way that disturbed hospital's psychiatric patients); *Brown v. Polk County,* 61 F.3d 650, 658 (8th Cir. 1995) (en banc) ("[*Pickering*] dealt with free speech rather

than the free exercise of religion, but because the analogy is such a close one, and because we see no essential relevant differences between those rights, we shall endeavor to apply the principles of *Pickering* to the case at hand."); *Tucker v. State of California Dep't of Education*, 97 F.3d 1204, 1210 (9th Cir. 1996) (applying *Pickering* balancing test in reviewing First Amendment challenge to restrictions on a public employee's expression of religious views); *Sims v. Metropolitan Dade County*, 972 F.2d 1230, 1237-1238 (11th Cir. 1992) (applying *Pickering* test to uphold suspension of community affairs worker who, in his private capacity as a minister, "fanned the flames" of racial animosity he was charged with putting out in his governmental job.)

There are two simple reasons for this unanimity. First, religious speech is entitled to the *same* high level of protection as political speech, not to *greater* protection. Political speech "occupies the highest rung of the hierarchy of First Amendment Values." *Connick v. Myers*, 461 U.S. 138, 145 (1983).

Second, the government's interests do not vary according to whether the speech is political or religious. When acting as an employer, the government has a legitimate interest in assuring that the public comments of its employees do not disrupt effective operations or "obstruct[ ] the implementation of policies . . . sanctioned by the electorate." *Elrod v. Burns*, 427 U.S. 347, 367 (1978); *see Waters v. Churchill*, 114 S.Ct. 1878, 1888 (1994) ("The government's interest in achieving its goals as effectively as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it

acts as an employer.") Thus, if a high-level official's public remarks undermine the mission of the agency the official serves, or the public's confidence in the official's ability to carry out that function, the government has the right to discipline the official, whether the speech expresses religious views or not.

Lumpkin's suggestion that a different rule should apply is nonsensical. Were he right, a President could discharge a Secretary of Defense who, *on policy grounds,* publicly opposed a presidential decision to use force in the Middle East, but the same President could not discharge a Secretary of Defense who said he opposed the use of force *based on religious beliefs.* Similarly, a governor could discharge a prison warden who refused to carry out an execution based on *philosophical* opposition to the death penalty but would have to retain a warden who stated a *religious* objection. Or, in a case such as this one, a Mayor would have to retain a Human Rights Commissioner who said he believed in the biblical disapproval of homosexuality, but the Mayor could discharge a Commissioner who opposed homosexuality based on what was written in *Mein Kampf.* The law is not so foolish.

Thus, in this case, the Ninth Circuit was correct when it wrote:

> Because the Human Rights Commission, as the District Court put it, 'formulat[es], implement[s] and explain[s]' the City's anti-discrimination policies, Order at 9, the City has not only a legitimate, but a heightened expectation that its Human Rights Commissioners refrain from speaking publicly in a way that

> mocks the City's antidiscrimination policy. *Compare Rankin v. McPherson*, 483 U.S. 378, 390 (1987) ("The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails.") *with Thomas v. Carpenter*, 881 F.2d 828, 831 (9th Cir. 1989) (governmental interest is not furthered by discharge of nonpolicymaking employees who are not in a position to thwart governmental goals). Government employees who occupy policymaking positions may even be removed solely on the basis of political affiliation, whether or not the employees make public statements, because of 'the need for political loyalty of employees, not to the end that effectiveness or efficiency be insured, but to the end that representative government not be undercut by tactics obstructing the implementation of policies of the new administration. . . . "

109 F.3d at 1501.

Lumpkin offers no persuasive reason why the *Pickering* balancing test should not apply in cases involving religious speech by government officers and employees. The best he offers are out of context quotations from this Court about the absolute protection the Constitution affords to the profession of religious belief. Pet., pp.11-14. Of course, the cases he cites involve situations where the government is acting as the sovereign, not as an employer. *See Waters v. Churchill*, 114 S.Ct. at 1888. Here, the City's actions were not taken against Reverend Lumpkin as an ordinary citizen, but as a high level City official:

> To be sure, when Reverend Lumpkin speaks as a private citizen, he has every right to preach that

> homosexuality is a sin and that Leviticus says that "a man who sleeps with a man should be put to death." CR 29, Exh. E, at 5. But the First Amendment does not assure him job security when he preaches homophobia while serving as a City Official charged with the responsibility of "eliminat[ing] prejudice and discrimination."

109 F.3d at 1500.

Certiorari is equally unnecessary to review whether the courts below properly *applied* the *Pickering* test. There is no reason to depart from the Court's rule against reviewing the alleged misapplication of a properly stated rule of law. Rules of the U.S. Supreme Court, Rule 10. Under well-established law, courts give substantial weight to a public employer's reasonable judgment that an employee's statements disrupt the operation of a public function. *See Waters v. Churchill*, 114 S.Ct. at 1889; *Connick v. Myers*, 461 U.S. at 152.[4] In this case, there is no question about the disruption caused by Lumpkin's statements. Lumpkin himself admitted that the Mayor was "besieged" with demands that he be removed from office after his initial statements about homosexuality were published in the San Francisco *Chronicle*. Given Lumpkin's subsequent televised statements, the Ninth Circuit properly concluded:

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[4] As the courts below properly noted, a public employer's interest in avoiding disruption of public functions is especially weighty where the employee, like Lumpkin, serves in a polcymaking position. *Elrod v. Burns*, 427 U.S. at 367.

> When we apply *Pickering* and weigh the City's interest in eliminating prejudice and discrimination against Reverend Lumpkin's First Amendment interest in condemning homosexuality as a sin while serving as a voting member of the Human Rights Commission, the conclusion is inescapable that the City's interests prevail. . . . [T]he City's interest in having commissioners who work to promote City policies far outweighs any commissioner's First Amendment interest in publicly expressing views that subvert those policies.

109 F.3d at 1501.

There is no need for review of legal conclusions that are so obviously correct and over which there is no disagreement among the lower courts.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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